89-477

No.:_____

Supreme Court, U.S.
FILED
AUG 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

CHANDLER'S COVE INN, LTD., Petitioner

against

HON. MARVIN A. HOLLAND, UNITED STATES BANKRUPTCY JUDGE, EASTERN DISTRICT OF NEW YORK, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY W. MINTZ
Counsel of Record
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35 pp

QUESTIONS PRESENTED

1. Whether or not a Judge's impartiality might reasonably be questioned by the public within the meaning of 28 U.S.C. § 455 (a) where the case is non-randomly assigned to him by another Judge who recuses herself to avoid any appearance of impropriety and where the Judge responds to the recusal motions by utilizing the Court's power to sanction those parties or attorneys who sought his recusal?

2. Whether a Writ of Mandamus should be issued to review the Bankruptcy Court Judge's denial of the motion for recusal so as to maintain public confidence in the integrity of the judiciary and to avoid the prospect of tainting all of the proceedings before the Bankruptcy Court?

PARTIES

The petitioner in the Court below was Chandler's Cove Inn, Ltd. The respondent, who was unnamed in the caption in accordance with the rules of the United States Court of Appeals for the Second Circuit is the Honorable Judge Marvin A. Holland, United States Bankruptcy Judge, Eastern District of New York.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

In Re:

CHANDLER'S COVE INN, LTD.,

Petitioner

TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner CHANDLERS COVE INN, LTD. (CCI) respectfully requests that this Court issue a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit refusing to disqualify a Bankruptcy Judge who at the request of another Judge who recused herself to avoid any appearance of impropriety, accepted the non-random assignment of two related bankruptcy cases known as In Re Chandler's Cove Inn, Ltd. and In Re Cedar Tide Corporation.

OPINIONS BELOW

The opinion of the United States Bankruptcy Court denying the motions for recusal is reprinted in the Appendix, Pages 2a - 17a.

The United States Court of Appeals rendered an order on May 25, 1989 denying recusal (Appendix, A1).

JURISDICTION

The order of the United States Court of Appeals was entered on May 25, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This petition is timely filed.

STATUTE INVOLVED

The principal statutory provision involved here is 28 U.S.C. § 455(a), which provides as follows:

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

Cedar Tide filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court, Eastern District of New York (Goetz, J.) in December of 1985. The case was assigned to the Honorable Judge Goetz. CCI maintains that Cedar Tide was a non-operating shell which was not entitled to protection under Chapter 11 of the United States Bankruptcy Code.

Cedar Tide commenced an adversary proceeding against CCI in that case which was presided over by the Honorable Judge Goetz, seeking to set aside a certain deed to real property. Prior to the date that Cedar Tide's motion for summary judgment was granted, CCI filed a Chapter 7 Bankruptcy petition in the Southern District of New York on September 26, 1986. The filing of the petition was prompted

by the fact that CCI, the record owner of the property at issue in the adversary proceeding, was unable to obtain liability insurance and had been advised by local governmental authorities that the premises, utilized as multiple dwellings, were in such a dilapidated condition as to pose a serious risk to the health and well being of the residents of the property. CCI, not being in possession, filed the Bankruptcy petition in an attempt to protect itself against potentially unlimited liability in relation to the real property. The basis of venue was that CCI maintained its office in the Southern District of New York for the 180 days preceding the filing of the petition. The case was assigned to Judge Buschman.

Judge Bushman entered an order transferring the venue of the CCI case to the Eastern District of New York. The basis cited for the transfer was the "interests of justice". The motion was granted even though none of the creditors or other parties in interest were notified of the application nor did the movant, counsel for CEDAR TIDE argue that a discretionary change of venue should be granted. The CCI bankruptcy case was transferred to Judge Goetz.

In or about January of 1987, an action asserting common law claims was brought against Robert Pryor by Lisa Scott, the 13 year old daughter of Paul and Shari Scott, principals of CCI. Pryor was the interim trustee appointed by Judge Goetz in the CCI case. The action, commenced against Pryor in the Supreme Court of the State of New York, County of Suffolk, sought damages against Pryor for intentional infliction of emotional distress directed against the child plaintiff in which he threatened to have her and her family imprisoned if she did not provide him with information as to where he could reach her older sister. Pryor answered the state Court action and then purported to remove it to the Bankruptcy Court, upon an assertion that it was a "core bankruptcy proceeding".

Judge Goetz thereafter recused herself from the adversary proceeding involving Pryor, indicating that she would have the Chief Judge of the Bankruptcy Court, Hon. Conrad E. Duberstein enter an order reassigning the case to Bankruptcy Judge Marvin A. Holland, who would be hearing

some related matters involving CCI while she was not going to be sitting on the bench. An order was entered reassigning the case to Judge Holland.

The attorney for Lisa Scott in the Pryor adversary proceeding moved for the recusal of the Court (Holland, J.), based upon the non-random assignment of the case. Judge Holland denied the recusal motion in an opinion and made a finding that the case had been randomly assigned to him. The Court reserved the issue of sanctions against movant until the conclusion of the case.

In the Pryor adversary proceeding, the Court dismissed the action despite the fact that the motion was not on the Court's calendar and without the presence of the minor child or her guardian or attorney when it was heard and gave advice to Robert Pryor's attorneys as to the means they should employ in the State Court proceeding.

On the Court's own motion in the Pryor matter, it directed Lisa Scott's counsel to show cause why his permission to appear pro-hac vice should not be revoked on the grounds that counsel for the defendants allegedly experienced difficulty in contacting her counsel Frank Krotschinsky.

After a hearing, Judge Holland rendered a decision that Lisa Scott's counsel's authorization to appear was to be withdrawn on the grounds that his failure to personally answer a phone call from counsel for the defendant's on one solitary occasion "impaired the Court's efforts to assure a dignified and orderly trial". This finding was made despite the fact that no trial was actually in progress. The order rendered by Judge Holland provided that its effect be stayed until July 6, 1987.

Counsel for the plaintiff LISA SCOTT, FRANK KROTSCHINSKY filed a notice of appeal and designation of the record with the Bankruptcy Court prior to July 6, 1987, seeking review in the District Court of the order which disqualified counsel and left the minor child without an attorney to protect her interests.

In response to the filing of the notice of appeal, Judge Holland again brought an application on the Court's own motion, returnable July 29, 1987, as to why Frank Krotschinsky should not be sanctioned by the Court for filing the notice of appeal seeking review of Judge Holland's order. The motion was opposed by counsel for Frank Krotschinsky who pointed out to the Court that no violation of its order occurred since the prior order was stayed by its own terms. Judge Holland reserved decision on that motion on July 29, 1987, and as of the date of the preparation of this petition, no opinion has been rendered by Judge Holland on the motion.

In or about June 25, 1987, Judge Goetz entered an order withdrawing from the CCI and Cedar Tide cases and related adversary proceedings. The cases were to be randomly reassigned by the Chief Judge. Instead, the cases were assigned to Judge Holland on the basis that he was presiding over the Pryor matter, which as the record unequivocally shows, was not randomly assigned when Judge Goetz recused herself from that case.

Upon learning of the reassignment to Judge Holland, CCI immediately sought to move by Order to Show Cause for the Court's recusal pursuant to 28 U.S.C. Section 455 on the basis that the manner of assignment to Judge Holland after Judge Goetz's recusal for cause created an appearance of impropriety. CCI requested that the matter be assigned to any Bankruptcy Judge provided that same was done by random assignment. Judge Holland refused to sign successive proposed Orders to Show Cause. With respect to the first order, the Court found that the papers were deficient because Local Bankruptcy Rule 22 required a certification as to why the application could not have been made by ordinary motion. A revised motion certifying why the Order to Show Cause should issue was rejected by Judge Holland, who could discern no reason why the issue of recusal could not be presented by ordinary motion. CCI moved for recusal by motion returnable on August 5, 1988.

Amongst the cases assigned to Judge Holland upon Judge Goetz's recusal was a purported adversary proceeding brought by Cedar Tide against CCI's counsel, Sidney W.

Mintz. In the adversary proceeding, Cedar Tide moved for the entry of an injunction preventing CCI's counsel from making any applications without the permission of the Bankruptcy Judge. In addition, the complaint prayed for sanctions against Mintz based upon the conclusory assertion that six enumerated motions previously made and decided by the Court were frivolous. Motions for summary judgment were made by both sides and Judge Holland reserved decision on October 14, 1987. As of the date of the preparation of this petition, no decision has been rendered by Judge Holland and the action for sanctions and for an injunction is still pending. When Mintz filed an action against Cedar Tide for a declaratory judgment that it was a non-operating shell corporation which defrauded the Court and its creditors, without the right to invoke the jurisdiction of the Court against him, Judge Holland dismissed the action immediately, reasoning that since Mintz was the attorney, he didn't have the right to bring an action against Cedar Tide, even though it was maintaining an action against him asserting the validity of the bankruptcy as the basis for its claims. When counsel for Mintz did not appear on a motion which he brought before Judge Holland, the Court decided to entertain the application for sanctions concerning the earlier order dismissing the action in counsel's absence. The Court awarded sanctions against counsel for Mintz without a hearing, the bulk of which constituted travel time for counsel for Cedar Tide to appear and argue the prior motion for summary judgment.

Apparently, in the present cases, the Bankruptcy Court Judge has attempted to stifle or prevent CCI, its principals and their daughter LISA SCOTT from obtaining redress by 1) delaying the resolution of motions for inordinate periods of time (in excess of two years on some matters); 2) by entertaining, bringing and/or granting applications to sanction, enjoin or disqualify counsel and 3) by failing to investigate or take appropriate action concerning serious allegations of criminal conduct.

On April 8, 1988, the Bankruptcy Court (Holland, J.) rendered an opinion denying CCI's motions for recusal in all respects (See opinion, attached hereto-Appendix A___-A____). On November 17, 1988, an order submitted by

counsel for CCI, denying the recusal motions, was signed by the Honorable Judge Marvin A. Holland. The order was not entered at an earlier time apparently because counsel for both parties were not formally notified by the Court of its decision.

CCI sought leave to reargue its prior motions for recusal, which resulted in the Bankruptcy Court's entry of an order on November 17, 1988, denying recusal. The motion to reargue was based upon the assertion that the Bankruptcy Court misapprehended the facts or misconstrued relevant law when it determined that recusal was not required to avoid an appearance of impropriety.

CCI suggests that the circumstances surrounding the non-random assignment of these matters from Judge Goetz to Judge Holland, when considered by a reasonable person aware of the facts, would support an appearance of impropriety. In addition, the Bankruptcy Judge's use of the Court's power to disqualify or otherwise sanction the attorneys who sought his recusal is supportive of an appearance of impropriety. This appearance of impropriety casts a shadow upon the judicial process and provides a basis for any party to attack the validity of any decision rendered against it in this matter. In seeking recusal, it is CCI's desire to remove any appearance of impropriety from these matters so as to assure that judicial decisions rendered by the Court, regardless of the determination of the applications on the merits, are not subject to being undone on appeal because of an appearance of impropriety. In the Bankruptcy Court's opinion denying recusal in these matters it does not confront the means by which these cases were assigned to the Honorable Judge Holland upon the recusal of Judge Goetz to avoid a possible appearance of impropriety. Judge Goetz, in recusing herself, recognized that judicial resources would be wasted by protracted litigation concerning such issues, which would not be in the best interests of the bankruptcy estates involved here.

An examination of the docket sheets in the two related proceedings (In Re Cedar Tide and In Re Chandler's Cove Inn, Ltd.), indicates that the Chandler's Inn matter was assigned to Judge Holland based upon information received

by the Chief Judge from the Clerk that a related adversary proceeding (entitled Lisa Scott v. Pryor) had previously been assigned to Judge Holland for his consideration. The transcript of proceedings in the Pryor matter indicates that Judge Goetz stated that upon her recusal the case would be assigned to Judge Holland. The next day, Judge Duberstein, the Chief Judge of the United States Bankruptcy Court assigned the case to Judge Holland, purportedly by random assignment. The assignments of all of the other CCI and Cedar Tide related cases followed and were based upon the non-random assignment of the Scott v. Pryor case assigned to Judge Holland. The moving papers on the recusal motion further indicate that Judge Holland's former law firm was engaged in a Bankruptcy case known as Current Electric which involved Pryor and Pinks, Brooks, Stern & Arbeit, the attorneys for Cedar Tide Corp. The moving papers indicated a close working relationship between Judge Goetz and Judge Holland and further indicates that Judge Goetz's basis for recusal, predicated upon the improper activities of her lawman, were undertaken while the lawman was under the supervision of Judge Holland, who was hearing Judge Goetz's cases during her absence.

It is submitted that the action taken by Judge Goetz, granting recusal to avoid any possible appearance of impropriety should have been followed by the Honorable Judge Holland now that it has come to his attention that these cases were not randomly assigned. This result should obtain irrespective of Judge Holland's knowledge or lack of knowledge as to the means by which the cases were assigned. It is submitted that by refusing to grant recusal the Bankruptcy Court is frustrating the purpose of Judge Goetz's prior decision to recuse herself to avoid any possible appearance of impropriety since it appears, to a reasonable objective observer, that Judge Goetz's recusal was ineffective to rectify a possible taint in the proceedings since the cases were not randomly assigned thereafter. Instead, the appearance which is created in these cases is that the non-random assignment of these cases from a Judge who granted recusal to another Judge who frequently acts in her place during her absence, is that of impropriety even though no actual impropriety may exist.

By order dated December 27, 1988, Judge Holland granted CCI leave to reargue and conformed to his prior decision denying recusal.

CCI's Petition for a Writ of Mandamus was denied by the Court of Appeals on May 25, 1989.

REASONS FOR GRANTING THE WRIT

The Writ should be granted in this case because the refusal of the Courts below to follow the Congressional mandate of 28 U.S.C. Section 455 (a) undermines the statutory purpose of maintaining public confidence in the integrity of the judicial process, conflicts with this Court's decision in *Liljeberg v. Health Services Acquisition Corp.* and conflicts with decisions of other Circuit Courts of Appeals on this issue.

Under 28 U.S.C. § 455 (a), all that is needed is an appearance of impropriety on the part of the Judge. Whether the Judge has no interest in the case, or whether the Judge is pure in the heart and incorruptible is irrelevant to a determination of whether recusal is required under 28 U.S.C. Section 455 (a). *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983). Even in a situation where the Judge is not initially aware of the circumstances which create an appearance of impropriety, he is expected to rectify the problem when he becomes aware of the facts. *Liljeberg, Jr., v. Health Services Acquisition Corp.*, 56 U.S.L.W. 4637 at 4641. In *Liljeberg*, the judgment rendered by the District Court after a trial was vacated even though at that time the Judge did not have actual knowledge of the interest of a unnamed party which created the appearance of impropriety. This Court observed that: "the problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of Section 455 (a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."(56 U.S.L.W. at 4642) *** "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact" (Id. at 4643, citation omitted).

Petitioner submits that the Bankruptcy Judge has crossed the indistinct line beyond which recusal is required by his expression of hostility or bias directed against counsel for CCI to the detriment of the client. Unlike the situation in the mandamus action brought in *Re Drexel Burnham Lambert, Inc., et al.*, (2d Cir. Docket No. 88-3060), Cert. Denied, _____ U.S.L.W. _____ where the District Judge reported alleged professional lapses by counsel seeking recusal to the Chief Judge of the District Court for investigation, Judge Holland has responded to the recusal motions by: 1) bringing his own motion and disqualifying counsel for Lisa Scott on the pretext that his failure to personally answer one solitary telephone call from defense counsel impaired his efforts to assure a dignified and orderly trial even though no trial was in progress; 2) bringing his own motion to sanction Lisa Scott's counsel for seeking appellate review of the order which revoked his pro-hac vice authorization, 3) continuing to entertain a motion by Cedar Tide to enjoin CCI's counsel Sidney Mintz from bringing any further applications without the permission of the Bankruptcy Judge; 4) continuing to entertain a purported "action" brought by Cedar Tide for a judgment against counsel for CCI while preventing Mintz from asserting a claim against Cedar Tide.

In *Matter of Faulkner*, 856 F.2d 716 (5th Cir. 1988), the Court held that despite the absence of any showing of actual bias on the part of the trial Judge, he was disqualified under 28 U.S.C. § 455(a) because the appropriate standard is what a reasonable objective observer would think about the Judge's partiality.

Similarly in *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), the Court re-affirmed that the standard is that of an objective disinterested lay observer.

In the present case, the conduct of the Bankruptcy Judge has placed a "cloud" over two related bankruptcy cases. Without the availability of immediate review through the extraordinary Writ of Mandamus, petitioner will be deprived of the opportunity to obtain review of the Bankruptcy Judge's refusal to recuse himself. Review of the issue of the Judge's

ability to continue to preside over these Bankruptcy cases will not be reviewable by direct appeal until the entry of a final order at the conclusion of the administration of the bankruptcy cases and the numerous related adversary proceedings. Such a result undermines public confidence in the integrity of the judicial system and places undue emphasis on the procedural stance of this case (e.g. petition for mandamus) rather than upon an evaluation of the disqualifying circumstances under 28 U.S.C. Section 455 (a). By discouraging or denying prompt review of the issue of recusal, the Circuit Court of Appeals is abdicating its supervisory role over the conduct of the Judges of the inferior Federal Courts encompassed within the Circuit. In addition, the Circuit Court of Appeals, by declining to address the merits of a recusal motion, seriously undermines the effectiveness of the recusal statute since it sends a message to the lower Court Judges that their recusal decisions will not be subject to immediate review.

The Second Circuit's standard for mandamus as the vehicle to review a Judge's refusal to recuse himself, conflicts with the standards applied by other Circuits. The Second Circuit has applied an extremely stringent standard of mandamus review, thereby avoiding review of the merits of recusal decisions. Other Circuits, stressing the importance of maintaining public confidence in the integrity of the judiciary and recognizing mandamus as the only means to promptly review a Judge's decision upon a recusal decision, have invoked the Courts power to dispel the shadow or cloud which is placed over litigation when a Judge refuses to recuse himself in the face of a substantial challenge. *Union Carbide Corp. v. United States Cutting Service, Inc.*, 782 F.2d 710, 712-713 (7th Cir. 1986); *United States v. Balistrieri*, 779 F.2d 1191, 1204-1205 (7th Cir. 1985); *In Re Rogers*, 537 F.2d 1196, 1197 (4th Cir. 1976); In Re Faulkner, 856 F.2d 716, 720 (5th Cir. 1988).

The conflict between the Circuits as to the appropriate standard of review of a Judge's refusal to recuse himself or herself should be addressed by this Court. The standard for recusal under 28 U.S.C. Section 455 (a) should be uniformly applied in all Circuits so as to further the Congressional mandate and to promote public confidence in the integrity of the judicial process.

CONCLUSION

For the reasons stated above, it is respectfully submitted that a writ of certiorari should be granted.

Dated: August 21, 1989

Respectfully submitted,

Sidney W. Mintz
Counsel of Record
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APPENDICES

(A1-Order of the United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re: Chandler's Cove Inn, Ltd.

Docket No. 89-3021

Filed May 25, 1989

Petitioner

A petition for a writ of mandamus and/or prohibition together with a motion for a stay having been filed,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

Dated: May 25, 1989

s/ Ellsworth A. Van Graafeiland, U.S.D.J.

s/ Thomas J. Meskill, U.S.C.J.

s/ Ralph K. Winter, U.S.C.J.

Appendix B
Opinion of United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In Re:
CHANDLER'S COVE INN, LTD.,

Debtor.

Bankruptcy No. 187-71385-352

In Re:
CEDAR TIDE CORP.,

Debtor.

Bankruptcy No. 187-71386-352

Appearances:

Miller & Mintz
295 Madison Avenue
New York, New York 10017
By: Sidney W. Mintz, Esq.
Attorney for Chandler's Cove Inn, Ltd.

Pinks, Brooks, Stern & Arbeit
1383-26 Veterans Memorial Highway
Hauppauge, New York 11788
By: Robert S. Arbeit, Esq.
Attorneys for Cedar Tide Corp.

MARVIN A. HOLLAND, Bankruptcy Judge:

Presently before the court are identical motions made in each of the above-captioned cases requesting recusal of the undersigned pursuant to 28 U.S.C. Sec. 455.

This court finds the motions legally insufficient and factually without merit. Recusal is unwarranted since no

reasonable person, "were he to know all the circumstances, would harbor doubt about the judge's impartiality", *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1110 (5th Cir. 1980); *Note, Disqualification of Judges and Justices in the Federal Courts,* 86 Harv. L. Rev. 736, 745 (1973) and "the proverbial average person on the street with knowledge of all the facts and circumstances alleged in the motion to recuse", *In re Martin Trigona,* 573 F. Supp. 1237 (D.C. Conn. 1983), would not question this court's impartiality.

STATEMENT OF FACTS

Cedar Tide filed its voluntary Chapter 11 petition on December 10, 1985 and in accordance with Local Rule 7 the case was assigned to the Honorable Cecelia H. Goetz.

In April of 1986 Judge Goetz authorized the debtor's retention of Pinks, Brooks, Stern & Arbeit (hereinafter "Pinks") as debtors' bankruptcy counsel after having granted the withdrawal application of Mr. Harold Spivack.

In June of 1986 Pinks commenced adversary proceeding 086-0037 against Chandler's Cove seeking to set aside a deed transferring a parcel of property from Cedar Tide to Chandler's Cove. On October 16, 1986 Judge Goetz held the transfer void as having been executed post-petition without proper court approval.

On September 26, 1986, Chandler's Cove Inn, Ltd. filed a petition in bankruptcy under Chapter 7 of Title 11 in the Southern District of New York. Mr. Isaac Nutovic, Esq. was appointed interim trustee by the court. In November of 1986 Pinks moved the Bankruptcy Court for the Southern District of New York (Buschman, J.), pursuant to Bankruptcy Rule 1014, to transfer venue of the case and all of its proceedings to the Eastern District of New York, asserting

Appendix B
Opinion of United States Bankruptcy Court

improper venue under 28 U.S.C. Sec. 1408[1]. The court (Buschman, J.), on December 3, 1986, pursuant to Bankruptcy Rule 1014(a)(2), summarily granted the motion since it was undisputed that the principal asset subject to that proceeding was located in the Eastern District of New York. On Chandler's Cove subsequent motion to reargue, which was granted and heard on December 29, 1986, Judge Buschman adhered to his original decision holding that "where a case is in liquidation, venue should, in the interest of justice, be placed where the principal assets are if they are located in the district different from the debtor's principal place of business" (citing to *In Re Commonwealth Oil Ref. Co.*, 596 F.2d 1239, 1248 (5th Cir. 1979), *cert. denied* 444 U.S. 1045 (1980) (unpublished decision dated December 29, 1986)).

Pursuant to Local Rule 7, the *Chandler's Cove* bankruptcy case was assigned to Judge Goetz. On January 6, 1987, Isaac Nutovic, a Southern District panel trustee, was replaced as trustee by Robert Pryor, Esq., an Eastern District panel trustee. Mr. Pryor was then authorized to retain himself as attorney for the trustee.

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1. 28 U.S.C. Sec. 1408 states:
Venue of cases under Title 11
Except as provided in section 1410 of this title, a case under title 11 as may be commenced in the district court for the district -
(1) in which the domicile, residence, principal place of business in the United States, or the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty day period than the domicile, residence, or principal place of business in the United States, or principal assets in the United States, of such person were located in any other district; or
(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

Appendix B
Opinion of United States Bankruptcy Court

On or about April 30, 1987, a motion was brought by Chandler's Cove seeking Judge Goetz's disqualification. Judge Goetz, on May 14, 1987, held that based upon the totality of the circumstances recusal was neither warranted nor necessary. Chandler's Cove appealed.

By further motion made on or about June 15, 1987, Chandler's Cove sought an order (1) granting the debtor leave to renew its prior motion for recusal; and (2) disqualifying Judge Goetz from hearing all core and non-core proceedings related to the administration of this case. Judge Goetz reserved on that motion.

While decisions on both the appeal and the new motion were pending, Judge Goetz learned that her law clerk had attended an adjourned Section 341 meeting in the Chandler's Cove case. Section 341(c) prohibits the court from presiding over or attending any such meeting, but contains no similar prohibition with regard to support personnel. Nevertheless, in order to avoid the possibility that the raising of this issue might delay the cases and in order to avoid not so much the appearance of impropriety but rather the possibility of a specious accusation of impropriety, Judge Goetz, on June 25, 1987, recused herself *sua sponte*. Chief Bankruptcy Judge Duberstein thereafter reassigned the cases to the undersigned.

Almost immediately thereafter, Chandler's Cove applied for an order to show cause to obtain recusal of the undersigned alleging an appearance of impropriety. After the order to show cause was denied for failure to comply with Local Bankruptcy Rule 22(d)[2], a motion was made pursuant to 28 U.S.C. Sec. 455 seeking recusal of the undersigned with

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2. Local Rule 22(d) states:
Order to Show Cause No order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why a procedure other than notice of motion is necessary.

regard to both of the above-captioned cases and all proceedings thereunder and seeking reassignment of these cases by the Chief Judge of the District Court.

The motion is a collection of unorganized allegations containing factual misrepresentations, misleading innuendos, and conclusions unsubstantiated with regard either to fact or law. The moving papers makes no effort to comply with Bankruptcy Rule 9013 which requires that a "motion shall state with particularity the grounds therefore. . ." and for this reason alone the motion should be denied. However, in order to put the matter to rest, at least in this court, the merits of the motion will be addressed.

It is difficult to determine from the moving papers the precise grounds upon which the movant relies. It appears, however, that the main thrust of its motion can be organized into the following points:

1) based upon the "totality of the circumstances" in the Cedar Tide/Chandler's Cove cases as being "more than merely suggestive that a substantial appearance of impropriety exists." Notice of Motion for Recusal, at 21;

2) a substantial appearance of impropriety exists regarding an ex parte application submitted to this court by movant requesting permission to employ Mr. Douglas Durnin, Esq. to argue an appeal on behalf of Chandler's Cove before the Honorable Judge Weinstein, Chief Judge of the District Court for the Eastern District of New York. The movant alleges that "although the order was submitted some two weeks prior to the scheduled date of the appeal, Hon. Judge Holland took no action until the issue was moot. . ." *Id.;*

3) recusal is warranted because the involvement of the law firm of Holland & Zinker in a bankruptcy case entitled: *Wilma Frank, individually and d/b/a Current Electric Co. and William C. Frank, Sr., a/k/a William Frank* demonstrates a "close working relationship between Pinks, Pryor and the law firm of Holland & Zinker." *Id.* The claim is made that the undersigned was a partner in the law firm of Holland &

Zinker which represented the Franks. Robert Pryor served as its Chapter 7 trustee. The law firm of Pinks, Stern & Arbeit (the predecessors of Pinks, Brooks, Stern & Arbeit) was special counsel to the trustee in pursuing litigation against Carmel Construction Corporation. Therefore, it is argued, recusal is warranted because the undersigned "knew or should have known that Pinks and Pryor had been involved in a recent relationship with his law firm;" *Id.*

4) since Judge Goetz had earlier recused herself at least in part as a result of her law clerk's having attended a Section 341 meeting without her knowledge while she was out of the country, this court should do the same since "upon information and belief, the Honorable Judge Holland has dominion and control and/or responsibility for the conduct of . . . [the law clerk] on April 9, 1987 and at the time that the incident upon which Goetz found reason for her recusal, took place." *Id.*

An affidavit in opposition to the motion requesting recusal was filed by "Pinks" stating that the movant has not put forth sufficient facts warranting recusal, and further, the motion submitted for recusal is based upon affirmation of counsel while the court's rules require an affidavit. A supplemental affidavit in opposition was filed by "Pinks" alleging that the motion to recuse was another step of Chandler's Cove to bury Cedar Tide's attorney in paperwork and for that reason Bankruptcy Rule 9011 sanctions were sought.

Appendix B
Opinion of United States Bankruptcy Court

DISCUSSION

Bankruptcy Rule 9013 requires that a request for an order, submitted by written motion, state with particularity the relief requested, and the basis for which the relief can be granted. Since this motion does neither, it is procedurally defective. However, this court shall address the four grounds for relief in reverse order.

1) Recusal is requested upon allegations of improper conduct on the part of Judge Goetz's law clerk in attending a Section 341 meeting and the taint of the undersigned by virtue of routine contact with the law clerk thereafter.

(Although not entirely clear from the movant's papers, the undersigned, in addition to his own full case load, had undertaken full responsibility for Judge Goetz's case load during several temporary absences. During this time all matters which arose in the cases of Cedar Tide and Chandler's Cove and in all proceedings therein or related thereto were heard by the undersigned. This contact appears to have been the reason for Chief Judge Duberstein to have assigned these cases to the undersigned upon Judge Goetz's recusal. It was also during this time that Judge Goetz's law clerk attended the Section 341 meeting which was the subject of Judge Goetz's recusal decision).

Section 55(b) of the Bankruptcy Act of 1898, predecessor to the current Code, required that the Bankruptcy Judge preside over the first meeting of creditors, now called the Section 341 meeting under the present Code.

11 U.S.C. Sec. 341(c) states: "The court may not preside at, and may not attend, any meeting under this section. . . ." This provision was enacted as a part of the 1978 Code, one of the stated purposes being removal from the Bankruptcy Judge those administrative functions required under the previous Bankruptcy Act. *See* 1 Norton Bankr. L. & Prac. Secs. 3.01, 4.04, 4.05 and 4.07.

It is clear, therefore, that the prohibition against judicial

attendance was enacted to relieve the Bankruptcy Judge of an obligation incidental to an administrative function. It was never intended to make improper conduct which the predecessor statute had mandated.

Implicit in the moving papers is the suggestion that any attendance at a Section 341 meeting not only by the judge presiding over the case, but by anyone with whom he had any sort of close contact is impropriety sufficient to mandate recusal. However, the Clerk of the Court functions with almost the same proximity to the judge as does the judge's law clerk; and until the recent implementation of the U.S. Trustee system, it was the Clerk of the Court who presided over the Section 341 meetings. Since the Clerk serves at the pleasure of the judges, "dominion and control" over one who attends a Section 341 meeting cannot be grounds for recusal. Nor can the judge's knowledge of what occurred at a Section 341 meeting require recusal. Transcripts of these meetings are frequently prepared. When this is done they become a part of the court's file. As such they are often offered into evidence in matters pending before this court. Clearly then, the mere acquisition by the judge of knowledge of what transpired at a Section 341 meeting can neither be or appear to be improper as to mandate a recusal. Any alleged bias requiring recusal must be extrajudicial in nature, *In Re International Business Machines Corp.*, 618 F.2d 923, 928-29 (2d Cir. 1980), and not an opinion formed from facts learned by the judge during his participation in the matter. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). Thus, mere contact by itself between the judge and any judicial support personnel who may have been in attendance at a Section 341 meeting without more cannot be in any way improper.

What then can be either the argument or the authority for seeking recusal upon such a set of facts? - the movant offers none and we hold that none exists.

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Nor does this line of reasoning indicate a lesser sensitivity to judicial propriety than was observed by my distinguished colleague who first dealt with this problem. Judge Goetz's recusal was based not only upon the avoidance of any appearance of impropriety but also to a large extent upon the desire not to permit the moving parties to further compound and multiply the myriad proceedings before this court and thereby unnecessarily complicate these two cases. That she did so is a testament to her judicial acuity and temperament; it does not however create a precedent that mandates recusal of any judge who has had any peripheral contact with her former law clerk.

Furthermore, the movant's argument is predicated upon the alleged misconduct of the law clerk, and not the court. Even if this argument had any validity, then it is the law clerk, and not the judge, to whom recusal should be directed. If a clerk has a possible conflict of interest or where a reasonable person might question the law clerk's impartiality, then the clerk should be disqualified, and not the court. *Hunt v. American Bank & Trust Co. of Baton Rouge,* 783 F.2d 1011, 1015-16 (11th Cir. 1986). As the court in *Hunt* states "[a] clerk is forbidden to do all that is prohibited to the judge, *id.* at 1015, *quoting, Hall v. Small Business Administration,* 695 F.2d 175, 179 (5th Cir. 1983), but "a judge is not necessarily forbidden, however, to do all that is prohibited to each of his clerks." *Id.*

2) Recusal is also sought because of an "involvement of the law firm of Holland & Zinker with the *Current Electric* case before Judge Goetz." (Movant's notice of motion at 22.) Movant claims that this "involvement" "demonstrates a close working relationship between Pinks, Pryor and the law firm of Holland & Zinker, of which Hon. Judge Holland was a partner." *Id.* However, what the movant fails to take light of was that Holland & Zinker's legal representation of the debtors in *Current Electric* was a bankruptcy case *wholly unrelated* to the instant cases and proceedings. Moreover, there is no claim that Holland & Zinker represented any of the parties herein or any

interest now before this court; only that several years ago in a case in which they represented a party, (the debtor), Pryor (the successor trustee of Chandler's Cove after the change of venue and prior to conversion of the case from one under Chapter 7 on 4/24/87) was the trustee and Pinks (who now represents Cedar Tide) was special counsel to the trustee.

Our Circuit Court of Appeals has unequivocally held that "[t]he prior representation of a party by a judge or his firm with regard to a matter unrelated to litigation before him does not automatically require recusal." *National Auto Brokers v. General Motors Corp.*, 572 F.2d 953, 958 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). Nor does "any tenuous connection of a judge to a lawyer who has represented or dealt with a litigant in a case before that judge . . . automatically disqualify the judge." *In Re Martin-Trigona*, 573 F.Supp. at 1243; *Accord, In Re Beard*, 811 F.2d 818, 831-32 (4th Cir. 1987) (where the court denied recusal based upon the petitioner's claim that the presiding judge's past financial relationships with the lawyers representing parties in this Chapter 11 proceeding would have an effect on the outcome of the proceeding); *see also* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d Sec. 3544 at 589 (1984 ed.) (where the commentators similarly state: "A judge is not necessarily disqualified merely because a party to a case was a client of the judge while the judge was in practice if the case *is not connected* with any matter in which the judge had acted as counsel") (Emphasis added).

Although it is true that Robert Pryor was the trustee in *Current Electric*, that Pinks was special counsel to the trustee, and that the undersigned was a member of the firm representing the debtor, that case was not associated with or connected to any of the *Cedar Tide* and *Chandler's Cove* bankruptcy cases and proceedings. No relationship, financial or legal, exists between the court and any attorneys or their clients to these bankruptcy cases. Nor was the firm within which the under-

signed was then associated the attorney for any party or interest presently appearing before the court.

The relationship between the parties to the *Current Electric* case and these cases is non-existent. Not only did Holland & Zinker's representation of the debtors in the *Current Electric* case occur more than three years ago, but moreover, the undersigned was not the attorney of record and did not actively participate in the case. As the relationship between the undersigned and the parties to this proceeding is remote, the movant bears a substantial burden in showing that this proceeding is substantially affected by the undersigned's past relationships. *See, e.g., In Re New Mexico Natural Gas Antitrust Litigation,* 620 F.2d 794, 796 (10th Cir. 1980) (where the court reasons that when disqualification is requested because of a judge's interest in a lawsuit in which the court presides, as that interest lessens disqualification is required only if the litigation *substantially affects* that particular interest) (emphasis added); *Accord, In Re Johnson-Allen,* 68 B.R. 812, 818 (Bankr. E.D.Pa. 1987). Moreover, 28 U.S.C. § 455(b)(2) explicitly states - a judge shall disqualify himself "where in private practice he served as a lawyer in the *matter in controversy,* or a lawyer with whom he previously practiced law served during such association as a lawyer *concerning* the matter. . . ." (Emphasis added). Not only is recusal by virtue of the *Current Electric* case not required by 28 U.S.C. § 455, but recusal upon such a non-existent ground would constitute an abrogation of this court's duty to preside over these two cases, see *In re Martin Trigona,* 573 F.Supp. at 1243, *quoting, Resslin v. Keeneland Ass'n,* 274 F.Supp. 513, 514 (E.D. Ky. 1967) (where the court states "'It is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit where there is no valid reason for recusal.'"); *see also Lazofsky v. Sommerset Bus Co., Inc.,* 389 F.Supp. 1041, 1045 (E.D.N.Y. 1975) (where the court states "The Court's sworn duty is not to . . . [recuse itself] unless it believes that there are proper and reasonable grounds therefor."), and may

lead to a substantial waste of judicial resources. *In Re International Business Machines Corp.*, 618 F.2d at 933; *United States v. Daley*, 564 F.2d 645, 651 (2d Cir. 1977), *cert. denied* 435 U.S. 933 (1978); *Rosen v. Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966).

3) The Durnin allegations are set forth in the moving papers as follows:

> That there is a substantial appearance of impropriety in the facts relating to a certain order submitted to the Hon. Judge Holland, after a decision was rendered by the Hon. Judge Goetz on June 22, 1987, which purported to permit DOUGLAS DURNIN, ESQ., to argue an appeal on behalf of CHANDLER'S INN on June 15, 1987 before the Honorable Judge Weinstein, Chief Judge of the District Court for the Eastern District of New York. Upon information and belief, although the order of retention was submitted by your affiant to the Clerk of the Bankruptcy Court, some two weeks prior to the date of the scheduled argument of the appeal, the Hon. Judge Holland took no action until the issue was moot and the corporate debtor, CHANDLER'S INN, was officially without retainted counsel to argue its appeal.
>
> That on July 16, 1987, the Hon. Judge Holland refused to sign the retention order authorizing CHANDLER'S INN's retention of DOUGLAS DURNIN, as its appellate counsel.
>
> That the conduct of ISAAC NUTOVIC, in failing to file a notice of appeal from Judge Goetz's order in the adversary proceeding, that the conduct of ROBERT PRYOR in failing to seek enlargement of the time to file a notice of appeal in order to preserve CHANDLER'S INN's rights as well as those of its creditors, when combined with the Hon. Judge Holland's acts or omissions in failing to sign a retention order, gives

> the appearance that this Court was complicit in inappropriate conduct designed to defeat CHANDLER'S INN's appellate rights (Notice of motion for recusal, at 25-6).

These facts are simply misrepresented. The Bankruptcy clerk's docket, a portion of which is annexed in the Appendix, shows that on 5/28/87, by docket entry number 66, a proposed order authorizing Mr. Durnin to represent Chandler's Cove in an appeal (CV 88-2205) before Chief District Judge Weinstein was not signed. The court (Goetz, J.) reasoned that pursuant to § 327(a) employment of counsel is restricted to disinterested persons". Section 101(13) defines a "disinterested person" as a person that is not a creditor. Since Mr. Durnin is a creditor, the debtor's application to employ Mr. Durnin on appeal must be denied. Thereafter, on July 16, 1987, an order for reconsideration or reargument of the *ex parte* application to retain Mr. Durnin on appeal was submitted to this court for signature (docket entry #89). This court (Holland, J.) rejected the order for failure to comply with local Bankruptcy Rule 12.[3] The Order was not resubmitted until Friday, August 28 (Appendix "A") at 1:04 P.M. to the Clerk's Office where it was processed and subsequently transmitted to Chambers where it was signed on September 2 and docketed on September 4. Absent notice to Chambers of a specific time urgency, that is

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3. Local Bankruptcy Rule 12 states:

Defective Petitions, Schedules and Other Papers

(a) Any petition, schedule or other paper which is submitted to the Clerk of the Court for filing shall be affixed in a proper legal backing.

(b) The Clerk of the Court shall not accept for filing any petition, schedule or other paper which is illegible, incomplete or otherwise defective according to these or other applicable rules and prescribed official forms.

(c) Failure to comply with these or other applicable rules and prescribed forms shall constitute grounds for the Bankruptcy Judge to refuse to consider any petition, schedule or other paper which has been submitted for his consideration.

about the usual time between the submission of a proposed order to the Clerk's Office and the signing of the order in Chambers.

The movant alleges that Chandler's Cove was officially without retained counsel on appeal in adversary proceeding 086-0037. However, the District Court civil docket sheet, as well as the title page to the brief submitted by appellant Chandler's Cove, shows that Mr. Durnin was in fact acting as attorney for the appellant notwithstanding the debtor's incomplete and feeble attempts to obtain authorization thereof. (See annexed Appendix "B").

4) Finally, the movant, while contending that there is no intention to raise the proposition that Judge Holland is biased against Chandler's Cove and/or its counsel, suggests that the totality of the circumstances herein "are more than merely suggestive that a substantial appearance of impropriety exists." *Id.* at 24. Since the movant acknowledges that this court is not biased against Chandler's Inn and/or its counsel, we need not address this issue. However, this court must determine whether "an appearance of impartiality" exists mandating recusal.

A judge, once having drawn a proceeding, should not be recused based upon unsupported, irrational or highly tenuous speculation "for were he or she to do so, the price of maintaining the purity of appearance would be to empower litigants or third parties the right of exercising a negative veto over the assignment of judges." *See In Re United States,* 666 F.2d 690, 694-95 (1st Cir. 1981). With this in mind, we must decide whether the appearance of impartiality is real and strong enough to require disqualification pursuant to 28 U.S.C. § 455.

In applying § 455 courts have reached differing conclusions as to whether the standard for recusal is bias in fact or bias in appearance.

The origin of the present statutory scheme derives from the first disqualification statute enacted by Congress in 1792. The statute provided for disqualification where a judge was "concerned in interest" in the cause, or had been "of counsel

for either party." 1 Stat., ch. 36, § 11, Act of May 8, 1792. Thereafter, in 1821, the statute was amended to include "relationship to a party" as a grounds for disqualification. 3 Stat., ch. 51, § 643. In 1911, another basis for disqualification was added to the existing statute - if the judge had been a material witness for a party. This statute became section 20 of the Judicial Code of 1911. Section 20 was the subject of two major criticisms: (1) there was no mechanism requiring disqualification for bias or prejudice, in fact or appearance, and (2) the issue of disqualification was wholly within the discretion of the challenged judge. *State of Idaho v. Freeman*, 507 F.Supp. 706, 714 (D.C. Idaho 1981). In 1948, section 20 was recodified as 28 U.S.C. § 455. Section 455 created a dilemma. On the one hand, it required a judge to disqualify himself *sua sponte*, while, on the other hand, articulating an equally strong requirement or "duty to sit" on an assignment, even over a party 's objection, if a valid statutory ground for disqualification was absent.

In 1974 a new code provision was passed (Act of Dec. 5, 1974, Pub. L. 93-512, § 1, 88 Stat. 1609; Nov. 6, 1978, Pub.L. 95-598, Title II, § 214(a), 92 Stat. 2661) providing for judicial disqualification where the judge's impartiality "might reasonably be questioned." 28 U.S.C. § 455(a) This amended version is now the basic provision on disqualification of federal judges. *See U.S. v. Wolfson*, 558 F.2d 59, 61-2 (2d Cir. 1977). This code provision adopts an objective standard creating the so-called "appearance of justice" rule thereby abrogating "the duty to sit" concept previously found in the federal courts. *In Re International Business Machines Corp.*, 618 F.2d at 929. The courts look to see "whether a reasonable person, knowing all the circumstances, would believe that the judge's impartiality could be questioned." *Id.* at 929; *In Re Beard*, 811 F.2d at 827; *U.S. v. Poludniak*, 657 F.2d 948, 954 (8th Cir. 1981), *cert. denied*, 455 U.S. 940 (1981); *U.S. v. Mirkin*, 649 F.2d 78, 82 (1st Cir. 1981); *Note: The Elusive Appearance of Propriety:*

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Judicial Disqualification under Section 455, 25 DePaul L.Rev. 104 (1975).

The adoption of the appearance of justice rule imposes on the court a *sua sponte* duty to determine its ability to preside. As the movant correctly points out, since § 455 places a duty upon the presiding judge to effect and evaluate his own actions, an affidavit requesting recusal need not be filed. *United States v. Heldt,* 668 F.2d 1238, 1271 (D.C. Cir. 1981); 13A Wright; Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d, § 3550 at 626 (1984 ed.). However, "[a] judge is presumed to be qualified, and the movant bears a *substantial burden* of providing otherwise." *State of Idaho v. Freeman,* 478 F.Supp. 33, 35 (D.C. Idaho 1979) (emphasis added). The movant herein has failed to sustain its burden.

Accordingly, the motion for recusal in all respects is denied.

SETTLE ORDER ON NOTICE.

MARVIN A. HOLLAND
Bankruptcy Judge

Dated: Brooklyn, New York
April 8, 1988